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11
12 **UNITED STATES DISTRICT COURT**
13 **FOR THE DISTRICT OF NEVADA**

14
15 JAMES V. DEPPOLETO JR.,
16 Plaintiff,

17
18 v.

19
20 TAKEOVER INDUSTRIES,
21 INCORPORATED, *et al.*
22 Defendant.

Case NO. 2:22-cv-02013-GMN-BNW

**DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION TO COMPEL
DISCOVERY FROM TAKEOVER
INDUSTRIES INCORPORATED,
MICHAEL HOLLEY, TOBY MCBRIDE,
JOSEPH PAVLIK, TOM ZARRO AND
NEXTGEN BEVERAGES LLC**

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25 COMES NOW Defendants' by and through counsel S. Don Bennion, Esq. of the Law
26 Office of S. Don Bennion and Jeffrey J. Whitehead, Esq. of Whitehead & Burnett and files this
27 Opposition to Plaintiff's Motion to Compel Discovery ("Motion") From Takeover Industries
28 Incorporated, Michael Holley, Toby McBride, Joseph Pavlik, Tom Zarro and NextGen

1 Beverage, LLC. This Opposition is made and based upon the papers and pleadings on file with
2 this Court, Defendants' Memorandum of Points and Authorities, the Exhibits referenced herein,
3 and the Declaration of S. Don Bennion, Esq., with Exhibits.
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MEMORANDUM OF POINTS AND AUTHORITIES

SUMMARY OF PLAINTIFF'S MOTION

Plaintiff's instant Motion is based on attorney Patrick Harvey's Declaration which claims that he was unable to "meet-and-confer with counsel for the Takeover Defendants, S. Don Bennion . . . December 17, 2024 at 10:00 PST," even though Plaintiff's counsel and Defendants' undersigned counsel conferred in-person November 21, 2024, before, during and after the first deposition of Defendant Tom Zarro in Las Vegas, Nevada at the law office of local counsel SHEA LARSEN following the receipt of attorney Harvey's November 20, 2024 letter regarding Defendants' alleged discovery deficiencies. (*See* S. Don Bennion Declaration; *See also* Patrick Harvey Declaration in support of Motion to Compel "Harvey Declaration"; *see also* November 20, 2024 letter from attorney Harvey to Defendants, Exhibit 14 to Plaintiff's Motion). Counsel for Plaintiff and Defendants also conferred via telephone and in writing many times between November 14 through December 17, 2024, regarding the scope of the depositions of Defendants' representatives Michael Holley and Tom Zarro, as well as the discovery issues set forth in Harvey's November 20, 2024 letter and undersigned counsel's email. *See* Declaration of S. Don Bennion; *see also* **Exhibit A** to Declaration of S. Don Bennion.

Plaintiff also argues that many documents have not been produced by Defendants in response(s) to Plaintiff's multiple requests for production of documents. Attached to the Declaration of S. Don Bennion as **Exhibit B** is Defendants' Seventh Supplement to Initial Disclosures dated December 31, 2024, and the proposed Stipulation and Order for Protective Order to govern the confidentiality of certain documents including, but not limited to,

1 documents related to the ongoing deposition of Defendant Tom Zarro. *See Exhibit C* to the
2 Declaration of S. Don Bennion, propose Stipulated Protective Order. In addition, since
3 Defendants' current, undersigned counsel filed an appearance in this case November 14, 2024,
4 hundreds of additional documents have been produced by Defendants as set forth in Exhibit B
5 including, but not limited to, documents now submitted pursuant to a proposed Stipulated
6 Protective Order as agreed to counsel for Plaintiff and Defendants at the deposition(s) of
7 Defendant Tom Zarro. Also, Defendants' Seventh Supplemental Production of Documents
8 dated December 31, 2024, produces new, current documents in accordance with the Federal
9 Rules of Civil Procedure.
10
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12 Plaintiff's instant Motion seeks to argue that Defendants have been unwilling to
13 produce relevant documentation herein, yet Defendant Zarro and others have recently testified
14 to the existence of relevant documentation which are now being produced since appearance of
15 new counsel. *See Exhibit B*.
16

17 **LEGAL ARGUMENT**

18 The Federal Rules of Civil Procedure permit a party to seek discovery "regarding any
19 non-privileged matter that is relevant to any party's claim or defense and proportional to the
20 needs of the case." FED. R. CIV. P. 26(b)(1). This has been interpreted broadly and
21 encompasses "any matter that bears on, or that reasonably could lead to other matters that could
22 bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S.
23 340, 351 (1978).
24

25 The party seeking to avoid discovery bears the burden of showing why that discovery
26 should not be permitted. *See V5 Techs. V. Switch, Ltd.*, 334 R.R.D. 306, 309 (D. Nev. 2019).
27 Arguments against discovery must be supported by "specific examples and articulated
28

1 reasoning.” *Id.* (citation omitted). District courts enjoy wide discretion in deciding relevancy
2 for discovery purposes, and relevance for the purposes of discovery is defined broadly. *Id.*
3 (citation omitted). The person resisting discovery carries the heavy burden of showing why
4 discovery should be denied. *Blankenship v. Hearst Corp.*, 519 F. 2d 418, 429 (9th Cir. 1975).
5 To meet this burden, the objecting person must allege specific facts, which indicate the nature
6 and extent of the burden, usually by affidavit or other reliable evidence, or sufficient detail
7 regarding the time, money and procedures required to comply with the purportedly improper
8 request. *Jackson v. Montgomery Ward & Co., Inc.*, 173 F.R.D. 524 (D. Nev. 1997) (citations
9 omitted).
10
11

12 In this case, the Defendants have provided sufficient responses to Plaintiff’s discovery
13 requests in their responses served December 6 and 9, 2024, as well as in Defendants’ Sixth and
14 Seventh Supplemental Discovery Responses to Requests for Production of Documents served
15 December 12 and 31, 2024. See Exhibit B to Declaration of S. Don Bennion.
16

17 The initial inquiry with any motion to compel is whether the moving party made
18 adequate meet and confer efforts. This Court has previously held that the movant must
19 “personally engage in two-way communication with the nonresponding party to meaningfully
20 discuss each contested discovery dispute in a genuine effort to avoid judicial intervention.”
21 *ShuffleMaster, Inc. v. Progressive Games, Inc.*, 170 F.R.D. 166, 171 (D. Nev. 1996). The
22 consultation obligation “promote[s] a frank exchange between counsel to resolve issues by
23 agreement or to at least narrow and focus matters in controversy before judicial resolution is
24 sought.” *Nevada Power v. Monsanto* 151 F.R.D. 118, 120 (D. Nev. 1993). To meet this
25 obligation, parties must “treat the informal negotiation process as a substitute for, and not
26 simply a formal prerequisite to, judicial review of discovery disputes.” *Id.* This is done when
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1 the parties “present to each other the merits of their respective positions with the same candor,
2 specifically, and support during the informal negotiations as during the briefing of discovery
3 motions.” *Id.*

4
5 Here, there was no the required meet and confer conference between counsel as
6 required. See Declaration of S. Don Bennion.

7 **CONCLUSION**

8 In accordance with the foregoing, Defendants submit that Plaintiff’s Motion to Compel
9 must be denied. Although many meaningful meetings and telephone conversations were
10 conducted between counsel for the parties herein, no rule LR 26-6c conference was conducted
11 as prerequisite to a motion to compel. See **Exhibit D** to Declaration of S. Don Bennion. In
12 fact, Plaintiff simply wrote we “are going to go ahead a file the motion to compel” December
13 17, 2024, notwithstanding the attempts of counsel to coordinate *another conversation* between
14 counsel. (emphasis added). See Exhibit D.

15
16 Accordingly, Defendants simply request that Plaintiff’s Motion to Compel be denied as
17 set forth herein. Defendants do not object to Defendant Zarro’s deposition continuing but a
18 stipulated protective order and/or court ordered protective order must be in place to protect the
19 respective interests of the parties herein. Contrary to Plaintiff’s claim that Plaintiff was
20 required to file the instant Motion to Compel by December 17, 2024, no such deadline was ever
21 imposed by Defendants and/or Defendants’ counsel. In fact, Defendants through counsel
22 repeatedly stated their agreement to any need for any continuance of discovery deadlines and/or
23 motion deadlines. See Declaration of S. Don Bennion.

24
25 In summary, while Defendants acknowledge that the continued deposition of Defendant
26 Zarro, which counsel for the parties concurred would not take more than an hour, may be
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1 Defendants' responsibility, no additional aspect of Plaintiff's instant Motion to Compel should
2 be granted by this Honorable Court.
3

4 Dated this 31st day of December 2024.

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CERTIFICATE OF SERVICE

On December 31, 2024 I served the following document(s): DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL DISCOVERY FROM TAKEOVER INDUSTRIES INCORPORATED, MICHAEL HOLLEY, TOBY MCBRIDE, JOSEPH PAVLIK, TOM ZARRO AND NEXTGEN BEVERAGE LLC

2. The document(s) were served by the following means to the person(s) as listed below:

☐ a. ECF System

And all other parties requesting notice.

☐ b. US mail, postage prepaid

☐ c. Personal Service:

I personally delivered the documents(s) to the persons at these addresses:

☐ For a party represented by an attorney, delivery was made by handling the document(s) at the attorney's office with a clerk or other person in charge, or if no one is in charge, by leaving the document(s) in a conspicuous place in the office.

☐ For a party, delivery was made by handling the document(s) to the party or by leaving the document(s) at the person's dwelling house or usual place of abode with someone of suitable age and discretion residing there.

☒ d. By direct email (as opposed to the ECF system): Based upon the written agreement of the parties to accept service by email or a court order, I caused the document(s) to be sent to the person(s) at the email addresses listed below. I did not receive, within a reasonable time after transmission, any electronic message or other indication that the transmission was unsuccessful.

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13 ☐ e. By fax transmission

14
15 Based upon the written agreement of the parties to accept service by fax transmission
16 or a court order, I faxed the document(s) to the person(s) at the fax numbers listed below. No
17 error was reported by the fax machine that I used. A copy of the record of the fax transmission
is attached.

18 ☐ f. By messenger

19 I served the document(s) by placing them in an envelope or package addressed to the
20 person(s) at the addresses listed below and providing them to a messenger for service.

21 I declare under penalty of perjury that the foregoing is true and correct.

22 /s/ S. Don Bennion, Esq
23 Law Office of S. Don Bennion
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